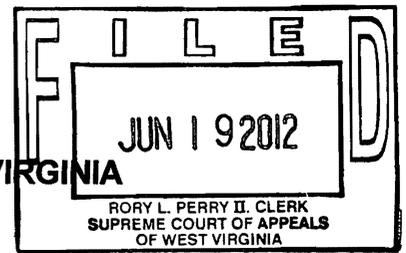


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-0044



**PSYCHOLOGICAL ASSESSMENT &
INTERVENTION SERVICES, INC.,**

Plaintiff Below, Petitioner,

v.)

Appeal from a final order of the Circuit
Court of Kanawha County (10-C-1443)

**WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY, d/b/a
BrickStreet Mutual Insurance Company,**

Defendant Below, Respondent.

PETITIONER'S REPLY BRIEF

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West Virginia Case Law

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Shamblin v. Nationwide Mutual Ins. Co.,
183 W.Va. 585, 396 S.E.2d 766 (1990).....3

Comes now the petitioner, Psychological Assessment & Intervention Services, Inc. ("PAIS"), by counsel, pursuant to Rule 10(g) of the *West Virginia Revised Rules of Appellate Procedure* and submits its brief reply to address certain points raised in the *Respondent's Brief of West Virginia Employers' Mutual Insurance Company, d/b/a BrickStreet Mutual Insurance Company* ("Respondent's Brief") heretofore filed herein.

Simply stated, BrickStreet resisted and eventually decided it was not going to pay for the expensive, long-term rhizotomy procedure needed by PAIS's injured employee, Ms. Radabaugh. In doing so, BrickStreet disregarded its obligation under the clear and unambiguous language of the workers compensation insurance policy to pay medical benefits to injured employees for compensable injuries.¹ In order to effectuate its decision not to pay for the long-term treatment, BrickStreet withheld payment to the injured employee for much needed medical treatment, thereby leaving her with no choice but to accept a grossly inadequate workers' compensation settlement in order to pay for treatment. However, BrickStreet's mistreatment of Ms. Radabaugh is not the issue before the Court on appeal.

This appeal arises from a dispute between an insurer and its insured. In this case, the insurer, BrickStreet, knowingly shifted its contractual obligation to pay medical benefits under the workers' compensation insurance policy issued to its insured, PAIS, and directed the injured employee to collect the long-term medical expenses directly from PAIS. PAIS had no knowledge that BrickStreet had committed

¹ PAIS policy of insurance with BrickStreet states, *inter alia*, that "[BrickStreet] will pay promptly when due the benefits required of you by the workers compensation law." (J.A.R., p. 287).

these acts until much later, and once PAIS learned of them, it brought this action against BrickStreet.

The circuit court summarily dismissed PAIS' lawsuit. In doing so, the circuit court entered the final order drafted by counsel for BrickStreet, which specifically noted that BrickStreet's motion for summary judgment was "based solely on BrickStreet's alleged failure to permit PAIS to participate in and object to the settlement of Ms. Radabaugh's workers' compensation claim." Notwithstanding the fact that PAIS admits its consent was not necessary, PAIS contends that the issue of consent was irrelevant as to its first-party causes of action against BrickStreet, and that a genuine issue of material fact does exist as to BrickStreet's taking action adverse to its own insured's interests.

The actual issue before this Court on appeal is whether the circuit court erred by summarily dismissing all of **PAIS' first-party causes of action against BrickStreet** for breach of contract, bad faith and unfair claims settlement practices. Certainly, there is ample evidence in the record upon which a jury could conclude that BrickStreet did not afford the rights and interests of its insured equal to or above its own. In a nutshell, PAIS contends that it did present sufficient evidence to the circuit court that the settlement agreement negotiated by BrickStreet with Ms. Radabaugh failed to serve the interests of PAIS' *as much or more than* those of BrickStreet. It is undisputed that the negotiated settlement agreement was designed to completely relieve BrickStreet of any further obligation to pay Ms. Radabaugh's future medical expenses under the workers' compensation insurance policy. However, BrickStreet had actual knowledge that PAIS was defending a deliberate intent suit and would have to pay the future medical

expenses from its own assets. In fact, BrickStreet directed Ms. Radabaugh to collect the additional long-term medical expenses from PAIS. This is the thrust of PAIS' claims against BrickStreet. It is not nearly as complicated as BrickStreet argues.

West Virginia law is well-settled that an insurer has a clear duty to attempt in good faith to negotiate a settlement with an injured third party and to accord interests and rights of the insured at least as great a respect as its own. In fact, an insurer's failure to do so is *prima facie* first-party bad faith. In Syllabus Point 2 of Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990), this Court held:

Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has *prima facie* failed to act in its insured's best interest and such failure to so settle *prima facie* constitutes bad faith toward its insured.

In the case *sub judice*, the parties agree there was no limit on the amount of medical benefits which could be paid to injured former employee of PAIS'. (J.A.R., p. 289). Nonetheless, BrickStreet elected to essentially threaten to withhold any additional payment of medical benefits to the former employee, unless she would accept the lump sum payment of \$50,000.00. In doing so, BrickStreet had actual knowledge that its insured, PAIS, was defending a deliberate intent claim brought by the same employee and that PAIS was exposed to pay additional sums for medical benefits in that proceeding. Instead of fully protecting PAIS and taking responsibility for all reasonable and necessary medical bills of the former employee, BrickStreet chose to relieve itself of any further liability and leave its insured, PAIS, to fend for itself. The actions of BrickStreet in this regard are the very essence of first party bad faith, as enunciated in

Shamblin, supra, and the evidence before the circuit court in this case constitutes *prima facie* bad faith.

In *Respondent's Brief*, BrickStreet's refuses to acknowledge that every medical provider who examined Ms. Radabaugh supported and corroborated the conclusion that Ms. Radabaugh needed future rhizotomy procedures every six months to two years to treat the compensable work-related injury. Not only does BrickStreet continue to ignore this crucial fact, it represents to this Court that "[t]he fundamental legal problem with PAIS' theories below is this: central to PAIS' claim is its principal contention that its employee Marcia Radabaugh's contested and unproven future medical needs were "compensable" by workers' compensation and should have been covered in the settlement agreement between BrickStreet and Radabaugh." *Respondent's Brief*, p. 12. BrickStreet claim that Ms. Radabaugh's future medical bills were contested and unproven is raised for the first time in this appeal and is a mischaracterization of the facts in this case.

As previously discussed in *Petitioner's Brief*, the facts are undisputed that every medical provider who examined Ms. Radabaugh, including those who examined her at the direction of BrickStreet, agreed on her need for long-term future medical treatment. Leilani VanMeter, BrickStreet's Claims Adjustor who "settled" Ms. Radabaugh's claim, has admitted as much. (J.A.R., p. 290, 292). Nonetheless, Ms. VanMeter informed Ms. Radabaugh that she was not going to authorize payment for any additional rhizotomy procedures. (J.A.R., p. 293). Ms. VanMeter explained that her refusal to pay for the much-needed rhizotomy procedures was based upon a records review performed by a

physician under contract with BrickStreet who never actually examined Ms. Radabaugh. According to Ms. VanMeter, the consulting physician “advised not to authorize anymore.” Id. Ms. VanMeter also admits that, despite knowing that every physician who examined Ms. Radabaugh agreed she needed the rhizotomy procedures, she concluded that “the medical in the file indicated that she had a sprain/strain type injury which doesn’t require the elaborate treatment that she was receiving.” (J.A.R., p. 291). In other words, she supplanted her own opinion of “the medical in the file” over that of the physicians who actually examined Ms. Radabaugh and decided that Ms. Radabaugh did need the long-term rhizotomy procedures. In doing so, BrickStreet shifted responsibility to PAIS, because BrickStreet knew PAIS was defending a deliberate intent case brought by Ms. Radabaugh.²

In *Respondent’s Brief*, BrickStreet sought this Court’s indulgence to clarify and explain the PAIS’s statement of the case in an “overly simplistic fashion.” Quite frankly, this *is* a very simple, straightforward case of breach of contract and first-party bad faith. BrickStreet, an insurer, placed its interests ahead of those of its insured, PAIS, when BrickStreet *knowingly* shifted its obligation to pay covered medical expenses to its insured. PAIS policy of insurance with BrickStreet states, *inter alia*, that “[BrickStreet] will pay promptly when due the benefits required of you by the workers compensation law.” (J.A.R., p. 287). BrickStreet admits that there was no limit on the indemnification of medical benefits related to the injury-producing work-related incident. (J.A.R., p. 289). BrickStreet admits that every physician *who examined* Ms. Radabaugh agreed

² BrickStreet made no effort to notify Ms. Radabaugh’s counsel in the deliberate intent action that it was settling the workers’ compensation claim and that it was not paying for the future long-term medical care and treatment needed by Ms. Radabaugh.

she needed the future medical treatment consisting of the elaborate rhizotomy procedures. (J.A.R., p. 290, 292).

While BrickStreet argues that PAIS case is “without merit,” “inscrutable,” “unfounded” and “ill-conceived,” BrickStreet fails to mention that it has changed its policies and it will no longer settle a workers compensation claim while a deliberate intent claim is pending. Leilani VanMeter (BrickStreet’s Claims Adjustor who “settled” Ms. Radabaugh’s claim) confirmed at her deposition that BrickStreet has changed its policy regarding settling a workers’ compensation claim while a deliberate intent claim is pending. (J.A.R. 295-296). In fact, BrickStreet will not settle a workers’ compensation claim while a deliberate intent claims is also pending. Id. Now, BrickStreet wants this Court to find that private insurers issuing workers’ compensation insurance policies should be immune from claims of breach of contract, bad faith or unfair settlement practices, regardless of the harm caused to an insured.

Conclusion

The circuit court erred by granting summary judgment to BrickStreet with a broad-sweeping order that dismissed PAIS’ entire complaint. The record is clear that the issue upon which BrickStreet sought summary judgment was whether PAIS had the right to participate in the settlement of a workers’ compensation claim. This issue was not even disputed by PAIS. A trial court may not grant summary judgment *sua sponte* on grounds not requested by the moving party. An exception to this general rule exists when a trial court provides the adverse party reasonable notice and an opportunity to address the grounds for which the court is *sua sponte* considering granting summary

judgment. In this case, there was no notice given to PAIS that the circuit was contemplating summary dismissal of PAIS' entire complaint. Moreover, the circuit court apparently ignored the evidence demonstrating that BrickStreet afforded its own rights and interests ahead of that of its insured, PAIS.

The circuit court erred by reaching conclusions of law on PAIS' three-count complaint without any corresponding factual findings to support such conclusions. Moreover, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755. As to the three-count complaint of PAIS, there are certainly genuine issues of material fact and those issues should be resolved by a jury.

RELIEF SOUGHT

Accordingly, your petitioner respectfully requests this Honorable Court to **REVERSE** the circuit court's order granting summary judgment in favor of BrickStreet, and to **REMAND** this matter to the circuit court for further proceedings, and for such other relief as the Court deems just and proper.

Signed: _____


J. Michael Ranson, Esquire (WVSB #3017)
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2012, true and accurate copies of the foregoing ***Petitioner's Reply Brief*** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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June 18, 2012

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Re: **Psychological Assessment & Intervention Services,
Inc. v. West Virginia Emp. Mut. Ins. Co. d/b/a
Brickstreet Mut. Ins. Co.**
Docket No. 12-0044

Dear Mr. Perry:

Please find enclosed an original *Petitioner's Reply Brief* and **Certificate of Service** for filing in the above referenced matter. The same has been forwarded to all counsel.

If you have any questions please do not hesitate to call.

Sincerely,



J. Michael Ranson
Attorney at Law

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Enclosures

cc: Ronda L. Harvey, Esquire
Corey L. Palumbo, Esquire
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